



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO E010 OF 2023**

**IN THE MATTER OF LIMITATIONS OF ACTIONS ACT CAP 22**

**LAWS OF KENYA**

**AND**

**IN THE MATTER OF LAND PARCEL TITLE NO.**

**KILIFI/MTWAPA/209**

**BETWEEN**

**1. FATUMA JUMA MRICHANGO**

**2. KHAMIS FARAJ MSELEM**

**3. WILSON KABUKA CHOME & 35 OTHERS.....**

**APPLICANTS**

**VERSUS**

- 1. WAINAINA KIGATHII MUNGAI**
- 2. OFFICER IN CHARGE, NDONYA POLICE STATION**
- 3. KILIFI COUNTY POLICE STATION**
- 4. LAND REGISTRAR, KILIFI**
- 5. THE HON. ATTORNEY GENERAL.....**

**RESPONDENTS**

**RULING**

- 1.** The application, dated May 6, 2025, and filed on June 4, 2025, seeks the setting aside of this court's dismissal orders dated May 6, 2025, and the reinstatement of the suit for a hearing on the merits with costs. The same is supported by the annexed affidavit of the applicant herein, one Fatuma Juma Mrichango, deposed on the even date.
- 2.** The application is opposed. A replying affidavit, sworn on the 3rd of July, 2025, by the 1st respondent, Wainaina Kigathi Mungai, is on record, along with grounds in opposition, dated the 28th of July, 2025, filed by the 2nd to 5th respondents.
- 3.** The court directed that the parties canvass the application through written submissions. I acknowledge receipt of the applicant's and the 1st respondent's submissions.

4. Based on the materials before me, the issues for this court's determination are whether to set aside the dismissal orders and have the matter set for hearing on the merits with the attendant costs.
5. Counsel for the applicants submits that sufficient cause has been shown why the matter could not proceed on the appointed date, as counsel for the applicant in the OS was sick and a medical record was supplied representing sufficient cause to warrant an adjournment of the matter, but that the suit was instead dismissed.
6. Counsel contends that, based on judicial precedent, the sickness of counsel is a sufficient ground for this court to exercise its discretion in reinstating the suit. See the principles laid down in *Shah v Mbogo and Anor*. [1967] EA 116,
7. Counsel further contends that there will be no prejudice occasioned to the respondent if reinstatement were to be ordered, as the applicant stands to suffer, and that if the suit is not reinstated, the applicant risks being evicted from the suit property.

8. Counsel further contends that Article 48 guarantees the right to access to justice, that Article 50(1) guarantees the right to a fair hearing, and that the dismissal of the suit on account of sickness by counsel is disproportionate.
9. On the other hand, counsel for the applicant argues that the application was brought belatedly. The application is allegedly dated 6th May 2025; however, it was filed in court only on 4th June 2025, almost a month after this Honourable Court dismissed the OS for want of prosecution. The applicant has not explained or given any reason for the almost a month-long delay in filing the application in court seeking to set aside the dismissal of the OS for want of prosecution, which is inordinate. The Medical Report shows that Titus Mukanzi Advocate had been given three (3) days of sick leave, meaning he was supposed to resume work on Friday, 9th May 2025. However, the application filed before this Honourable Court was allegedly prepared on 6th May 2025 (when he was still on sick leave) and filed in court almost one month later on 4th June 2025. No explanation has been given for the delay.

**10.** Counsel further contends that Applicant, Fatuma Juma Mrichango, has not given this Honourable Court any explanation for her absence from the court on the hearing date of 6th May 2025, when this matter came up for a virtual viva voce hearing of the OS. It is alleged that the supporting affidavit, allegedly signed by the Applicant, Fatuma Juma Mrichango, is a clear forgery and not her signature, when compared with her previous affidavits on record. It should therefore be struck off the court record.

**11.** On the sickness of counsel for the applicant, it is argued that the law firm on record for the applicants in this matter is Waziri Omollo & Company Advocates, not Titus Mukanzi, Advocate, trading as Waziri Omollo & Company Advocates. Waziri Omollo is also an advocate of the High Court. No explanation has been given to this honorable court for his non-attendance in court on 6th May 2025, if indeed Titus Mukanzi was allegedly indisposed.

**12.** Additionally, it is argued that Titus Mukanzi, Advocate, the concerned patient, has not sworn an affidavit under oath to confirm that he was indisposed on 6th May 2025 and attended

Coast General Hospital on the same day. He also applied for and received the medical report dated 6th May 2025, taking ownership of its authenticity and origin.

**13.** Further, a search of the register of Clinical Officers in Kenya shows that the person known as Jerome Hesbon is listed as inactive and, therefore, by law was not authorized to carry out any clinical duties on the date of the alleged treatment of the patient/Advocate and the preparation of the "medical report." The document produced in the further affidavit sworn by the applicants clearly shows and proves that the said Clinical Officer paid for his practicing certificate after this fact had been brought to the court's attention in the replying affidavit sworn by the 1st respondent.

**14.** Counsel references the decisions in **Wachira Karani v Bildad Wachira [2016] KEHC 6334 (KLR)** and **Leisure Lodge Limited v Solomon Amiani [2010] KECA 193 (KLR)** to support his submissions for the dismissal of the present application, arguing that discretion should not be exercised in favour of the applicant.

**15.** In their grounds of opposition, the 2nd to 5th respondents argue that the application is fundamentally flawed and legally inadmissible, asserting that it constitutes an abuse of the court process. They contend that the applicants have failed to satisfy the legal criteria for setting aside the dismissal orders issued by this Honourable Court on 6th May 2025. Additionally, they state that the application was filed on 4th June 2025, nearly one month after the case was dismissed, without any credible or adequate explanation for the excessive delay, and was backdated to 6th May 2025 in an apparent attempt to mislead this Honourable Court.

**16.** They further argue that the reasons provided by the applicants for their non-attendance at the hearing are not supported by any affidavit sworn by the relevant advocate, nor has any proper justification been presented for their absence on 6th May 2025.

**17.** The respondents also challenge the validity of the medical report relied upon by the applicants' advocate, noting that it was submitted without supporting documentation, such as treatment notes or receipts. Moreover, they raise concerns

about the credibility of the supporting affidavit allegedly signed by the 1st applicant, Fatuma Juma Mrichango, noting that the signature differs significantly from that on an affidavit sworn by the same applicant on 17th April 2023, thereby justifying its striking out. Finally, they assert that the applicants' overall conduct, including reliance on questionable documents, disqualifies them from obtaining the equitable and discretionary relief sought in the application.

**18.** The OS was filed on April 19, 2023, along with a subsequent application for an injunction and Preliminary Objection. On November 27, 2023, the parties agreed to maintain the *status quo* pending the hearing and determination of the main suit.

**19.** When this matter was scheduled for hearing on November 20, 2024, Ms. Amina represented Mr. Mukanzi for the applicants. She submitted that counsel was reportedly unwell. The application was contested. After carefully considering the application for adjournment and hearing the parties' arguments, the court, particularly given the age of the 1st respondent, who was said to be over 80 years old, determined

that the matter should be fast-tracked and declined to dismiss it that day. An adjournment was granted.

**20.** The matter was scheduled for hearing on the 6th of May 2025. Mr. Iddi, on behalf of Mr. Mukanzi, once again requested an adjournment because the applicant's counsel was said to have fallen ill that morning and instructed the applicants not to attend court.

**21.** The counsels for the respondents, Mr. Mungai and Mr. Munga, opposed the application on behalf of the 1st and 2nd to 5th respondents, respectively, because similar reasons were given regarding Mr. Mukanzi's illness when the matter was last in court on the previous dates. The counsels argued that other advocates in the firm of Waziri Omollo could competently proceed with the matter, rather than Mr. Mukanzi. They urged the court to proceed with the hearing or dismiss the case for want of prosecution. The court scheduled the matter for hearing at 11:00 a.m.

**22.** At 11:15 am, Mr. Iddi insisted that Mr. Mukanzi was ill. At the same time, the other counsels for the respondents, Mr. Mungai and Mr. Munga, maintained that the applicants were

not motivated to prosecute this matter, which pertains to a land issue, over which they are in illegal occupation.

**23.** In light of the circumstances of the case, and the past conduct of the parties and counsel who were not keen to prosecute the matter, the court, after careful consideration and exercising its discretion, declined to grant the adjournment and dismissed the applicant's suit with costs to the participating respondents, hence the current application.

**24.** After thoroughly reviewing the history of the case, the affidavits both supporting and opposing reinstatement, and the parties' submissions, the principles setting aside ex parte orders are reaffirmed by Mativo J. in **Wachira Karani v Bildad Wachira [2016] KEHC 6334 (KLR)**:

*“.. I find useful guidance in the court of appeal decision in the case of Richard Nchapai Leiyangu vs IEBC & 2 others[15] where the court expressed itself as follows:-*

*“We agree with the noble principles which go further to establish that the courts’ discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting*

***from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”***

**25.** As previously outlined, the history of this case demonstrates that the applicant has requested several adjournments, citing allegations that Mr. Mukanzi has been ill, which have served as the basis for these postponements. Before scheduling the hearing for the 6th of May 2025, the court reviewed the case history and observed that the 1st respondent was advancing in age. Additionally, the respondents contended that the law firm Waziri Omollo possessed other legal representatives capable of taking over the matter, aside from Mr. Mukanzi.

**26.** On the appointed date, instead of the law firm taking over the conduct, it insisted that Mr. Mukanzi handle the matter, which led to opposition from the respondents.

**27.** On the merits of whether counsel was sick on the appointed date, it is noted that a medical report was prepared. The Clinical Officer who prepared it was never licensed, and he regularized his practice much later, after the respondents

raised the issue. Moreover, Mr. Mukanzi himself did not file any averments to “own” the medical record produced, given that the Clinical Officer's competence had been challenged and the reasons for adjournment in the past were all pegged on counsel's illness, which remained unsubstantiated.

**28.** It has not been explained why counsels from Waziri Omollo law firm did not file averments showing they could not handle the matter, since the law firm was instructed, not Mr. Mukanzi individually.

**29.** Furthermore, there is no explanation as to why the applicants, despite their awareness of the scheduled hearings, have neither appeared in court nor demonstrated their willingness to proceed with the matter, notwithstanding the issuance of favorable orders maintaining the status quo in their favor.

**30.** Based on the conduct of the applicants and their counsel, I see litigants causing hardship to the respondents by failing to prosecute the matter and instead seeking to maintain the status quo to their advantage and at the detriment, particularly

of the 1st respondents. I decline to exercise discretion in their favor.

**31.** Consequently, the application dated May 6, 2025, lacks merit and is hereby dismissed, with costs to the respondents.

**Dated, signed, and delivered virtually at Nyeri on this 28<sup>th</sup> day of January 2026.**

**E. K. MAKORI**

**JUDGE**

**In the Presence of:**

Ms. Shisia for the Applicants holding brief for Mukanzi

Mr. Mungai for the 1<sup>st</sup> Respondent

Kendi: Court Assistant

**In the Absence of:**

Mr. Munga for 2<sup>nd</sup> - 5<sup>th</sup> Respondents